had reviewed" the "product with regard to its technical feasibility" and had "report[ed]" that Ameritech's offering could "be implemented on the DMS-100 switch product with currently generally available switch generics." Ameritech Advice No. 5432 (Illinois Commerce Commission, Aug. 1, 1996). Had provision of access to the switch threatened any of Nortel's intellectual property rights, Nortel surely would have raised such concerns with Ameritech at that time.

(3) Databases. As the Commission observed in the First Report and Order (¶ 490), "many separate carriers access incumbent LEC Toll Free Calling and LIDB databases for the proper routing and billing of calls." ¶ 490. AT&T operators, for example, routinely dip into LEC LIDB databases to determine whether a called party accepts collect and bill-to-third-party calls. Access to the LIDB and Toll Free Calling databases is tariffed on a stand-alone per-query basis in numerous LECs' access tariffs, and includes all of the functionalities, and the same apparent degree of control, that would be obtained by carriers purchasing those databases as unbundled elements. See, e.g., SBC F.C.C. Tariff No. 73, § 24, NYNEX F.C.C. Tariff No. 1, § 21.

(4) Signalling. The First Report and Order requires LECs to provide access to their signalling systems on an unbundled basis. See First Report and Order, ¶¶ 479-483. In that proceeding, "most BOCs state[d] that they already provide access to their signalling systems." Id.¶ 460. AT&T interconnects with the LECs today (primarily STP to STP) to exchange SS7 out-of-band signalling to process 800- and other long distance calls. AT&T

compensates LECs for the exchange of such signals on a stand-alone basis pursuant to numerous access tariffs. The functionalities and the optional points of interconnection offered for such signalling under existing tariffs appear to be no different from those provided under the Commission's order for purposes of providing local exchange services. See, e.g., SBC F.C.C. Tariff No. 73, § 23.

(5) Dedicated Transport Facilities. All LECs today provide access to dedicated facilities between LEC end offices and between such end offices and interexchange carrier points of presence for the origination and completion of interLATA calls. See, e.g., SBC F.C.C. Tariff No. 73, § 7; U S West F.C.C. Tariff No. 5, § 7; NYNEX F.C.C. Tariff No. 1, § 7; Bell Atlantic F.C.C. Tariff No. 1, § 7. The control interexchange carriers obtain to those facilities today are no different from those that would be obtained by CLECs for the transport of local exchange calls under section 251(c).

(6) Digital Cross-Connection. The "BOCs, GTE and other large LECs currently make [digital cross connect system] capabilities available for the termination of interexchange traffic." See First Report and Order, ¶ 444. DCS functionality allows carriers such as AT&T to aggregate and disaggregate high-speed traffic and is used, for example, to remotely reconfigure channels on a dedicated facility obtained from a LEC. AT&T purchases digital cross-connection from the LECs today as an option in conjunction with dedicated transport under LEC access tariffs, and obtains the same access in terms of functionality and control

as it would obtain purchasing digital cross-connection as an unbundled element under § 251. See, e.g., Bell Atlantic F.C.C. Tariff No. 1, § 7.2.12; Bell South F.C.C. Tariff No. 1, § 7.4.12.

(7) Access to LEC SMSs and SCEs for AIN Development. At the time of the First Report and Order, "BellSouth was prepared to tariff and offer" to other carriers "nondiscriminatory access to the SMS and SCE for the creation and deployment of AIN services." See First Report and Order, ¶ 496. In particular, BellSouth touted that its planned offering would permit "third party service providers' access to BellSouth's SMS capabilities" and SCE environment in order to "allow third party service providers to create" their own AIN "services to be executed on BellSouth's service platform." See BellSouth Petition for Expedited Waiver of Part 69 Rules (filed Dec. 8, 1995); FCC Notice Establishing Pleading Cycle, DA 96-27 (Jan. 17, 1996). Although further behind in their implementation, both Bell Atlantic and Ameritech had, prior to passage of the Act, announced plans "to allow third parties themselves to create AIN services at a terminal [] in [the BOC's] office." See First Report and Order, ¶ 496 & n. 1153. These plans would apparently have provided CLECs with the same degree of access and control to the LECs' SMSs and SCEs as the Commission required, yet none of these BOCs suggested that such access would have violated any vendor's intellectual property rights.[23]

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[23] In its brief to the Eighth Circuit, AT&T stated that a CLEC "might" obtain access to a third party's intellectual property under the Commission's AIN rules. See Joint Brief of AT&T et al. (continued...)

* * *

There is no relevant difference between the control CLECs now seek over these network elements under Section 251(c)(3) and the functionalities and control which interexchange and other carriers obtained in the past. In each of the above instances, carriers obtained the functionalities and capabilities of the incumbent LECs' discrete and identifiable network elements on a stand-alone basis and exercised no less control over those elements than the control they will now have for the provision of local services. Under the First Report and Order (¶ 258), the incumbent LECs will continue to be responsible for maintaining and provisioning these elements, just as they have been in the past.[24]

It is only now that carriers are seeking to exercise their statutory rights to purchase access to network elements in order to compete with the LECs that those LECs have raised the specter of vague "intellectual property rights" of third-party vendors as grounds for refusing to comply with their access obligations. The LECs' true objection appears to be to the purpose for which access is being sought and not to the fact of access

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[23] (...continued)
in Support of the FCC, p. 92, Iowa Utilities Bd. v. FCC, 96-3321 (8th Cir., filed Dec. 23, 1996). In light of these three RBOCs' actual announced plans to offer precisely the same access to CLECs prior to the 1996 Act, it appears that even that tentative suggestion was unwarranted.

[24] That is presumably why the most SBC could say in a recent carefully worded pleading was that its "agreements [with vendors] do not expressly authorize Southwestern Bell to give or provide access to the intellectual property to other telephone companies." See SWBT Br., pp. 4-5 (emphasis added). Of course, express authorization of that sort would be both remarkable and unnecessary.

itself. If the LECs (or their vendors) truly had valid intellectual property objections to the provision of access to network elements, those concerns would have been raised years ago.

Respectfully submitted,

/s/ DAVID W. CARPENTER

David W. Carpenter
Peter D. Keisler
Daniel Meron
SIDLEY & AUSTIN
One First National Plaza
Chicago, IL 60603
(312) 853-7237

Mark C. Rosenblum
Roy E. Hoffinger
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-3539

Counsel for AT&T Corp.

April 15, 1997

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Petition of MCI for Declaratory Ruling	CC Docket No. 96-98 CCBPol 97-4

REPLY COMMENTS OF AT&T CORP.

Mark C. Rosenblum
Roy E. Hoffinger
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-3539

David W. Carpenter
Peter D. Keisler
Daniel Meron
SIDLEY & AUSTIN
One First National Plaza
Chicago, IL 60603
(312) 853-7237

Counsel for AT&T Corp.

May 6, 1997

SUMMARY

The comments in this proceeding vividly illustrate the incentives that the ILECs have to exaggerate and even fabricate "intellectual property" claims in order to thwart competitive UNE-based entry. For example, while SBC/PacTel persists in maintaining that license agreements with its vendors preclude it from providing its competitors with access to unbundled elements, Lucent and Nortel -- by far its two largest vendors -- both confirm that in the ordinary course those agreements present no such impediments. The issue therefore is not whether there exist anticompetitive incentives to assert such claims even when they are groundless, but how the Commission should address and eliminate those incentives.

That issue is easily resolved, for the Commission has already addressed this precise claim in the recent Infrastructure Sharing Order. In that Order, the Commission expressly rejected under section 259 the very claim that SBC/PacTel and others now raise under section 251. It held (¶ 70) that ILECs may not "evade" their statutory obligations to share network facilities with other carriers "merely because their arrangements with third party providers of information and other types of intellectual property do not contemplate -- or allow -- provision of certain types of information to qualifying carriers," but are instead under a legal obligation "to seek, to obtain, and to provide [any] necessary licensing" by "negotiating with the relevant third party directly." That requirement both removes the ILECs' incentives to inflate the number and scope of their intellectual property claims, and provides the most efficient mechanism for obtaining any additional licenses that are actually necessary.

The Commission's conclusions in the Infrastructure Sharing Order are even more apt to the section 251 context, in which carriers are seeking access and interconnection in order to compete with the ILECs, and in which the ILECs' incentives to "evade" their statutory obligations are all that much greater. The Commission should therefore follow the same approach in this proceeding, and should reject the ILECs' claim that they may nullify CLECs' statutory rights to receive, and ILECs' statutory obligations to provide, access and interconnection by entering into contracts with their vendors that purport to authorize or require the very discrimination that the Act forbids.

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In the Matter of	)	
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REPLY COMMENTS OF AT&T CORP.

Pursuant to the Commission's Public Notice of March 14, 1997,[1] AT&T Corp. ("AT&T") respectfully submits these Reply Comments on MCI's Petition for Declaratory Ruling.[2]

The comments confirm the need for prompt Commission action in this proceeding. In particular, the comments vividly illustrate the incentives incumbent local exchange carriers ("ILECs") have to assert fabricated intellectual property claims as a means of denying competitive local exchange carriers ("CLECs") access to their network elements. The comments thus underscore that the Commission should follow the same approach under section 251 as it adopted under section 259 in the recent Infrastructure Sharing Order, in which the Commission squarely held that it is the ILECs' responsibility "to seek [and] to obtain" any licenses from

[1] See Public Notice, "Pleading Cycle Established for Comments on Petition of MCI for Declaratory Ruling that New Entrants Need Not Obtain Separate License or Right-to-Use Agreements Before Purchasing Unbundled Elements" (DA 97-557) (March 14, 1997).

[2] A list of the commenting parties, and the abbreviations used in these Reply Comments to refer to them, is attached as Appendix A.

third parties that are necessary to comply with their statutory obligations to grant other carriers access to their networks.[3]

For example, the principal basis on which SBC/PacTel now relies in asserting that it is unable to provide CLECs access to network elements is that a "fair reading" of many of SBC's licenses shows that "the parties intended" that the scope of the license grant would be limited to SBC "for [its] use in operating [its] own business."[4] But providing CLECs access to network elements is part of SBC's business, and its licensors have now confirmed that that is their understanding as well. Lucent Technologies, the manufacturer that accounts for the largest number of the approximately 80 licenses that SBC has claimed raise intellectual property concerns, states that an incumbent LEC's provision of access to unbundled network elements "generally constitutes such incumbent's 'own' or 'internal' business purpose"[5] and hence "generally no additional license agreements or fees should be required."[6] Similarly, Northern Telecom, Inc., the manufacturer that accounts for the second largest number of SBC licenses at issue, states that "[n]o additional vendor rights appear to arise where the customer's contractual limits on its use of such equipment and/or software would continue to apply to the requesting

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[3] See Report and Order, ¶ 69, Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996, CC Docket 96-237 (released February 7, 1997) ("Infrastructure Sharing Order").

[4] See Milgrim Aff., ¶ 19.

[5] See Lucent, p. 3.

[6] See id., p. 2.

telecommunications carrier's use of the unbundled network element."[7] Indeed, the only way SBC/Pactel appears to have been able to have its affiant, Mr. Milgrim, offer his limited opinion to the contrary is by repeatedly supplying him with erroneous assumptions on which to predicate it.

In any event, the Commission has already addressed SBC/PacTel's precise claim in the recent Infrastructure Sharing Order implementing Section 259. SBC argued there, as SBC/PacTel does here, that its statutory obligations to share facilities with other carriers "must be conditioned" on each of those carriers negotiating and obtaining "a sufficient license" from any third parties that SBC might allege have protected intellectual property embedded in SBC's network.[8] SBC further argued there, as SBC/PacTel does here, that to hold otherwise would impermissibly "override" third parties' "intellectual property rights" and SBC's "binding legal obligations" to those third parties.[9] The Commission expressly rejected that argument, concluding that SBC's legal obligation is "to secure [itself] such licensing by negotiating with the relevant third party directly."[10] The reaffirmation of that same obligation here should effectively remove the ILECs' incentives to assert groundless intellectual property claims, and will also provide the most effective and

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[7] See Nortel, p. 6.

[8] See Infrastructure Sharing Order, ¶ 63.

[9] See id.

[10] See id., ¶ 70.

expeditious means of obtaining any license amendments that might genuinely be needed.

These Reply Comments are divided into three parts. Part I addresses the ILECs' claims that the Commission lacks authority to conduct this proceeding. Those claims are insubstantial. The Commission has the express authority to interpret and clarify its existing rules and principles, as well as to adopt new ones, implementing the Act's requirement that ILECs provide CLECs nondiscriminatory access to network elements. See 47 U.S.C. §§ 154(i), 201(b), 251(d)(1), 251(c)(3), 303(r).

Part II shows that the ILECs have not seriously attempted to refute the legal basis for the requirement that they negotiate any license amendments necessary to provide CLECs with "nondiscriminatory access" to network elements. The Commission properly held in the Infrastructure Sharing Order (¶ 70) that an ILEC may not "evade" its statutory obligations by claiming that contracts with third parties preclude its compliance and then demanding that other carriers must therefore negotiate contracts of their own. The ILECs never identify any support for the assertion that they can somehow contract away their federal law duties, and none exists.

Finally, although it remains the case that the Commission need not make any sweeping determination here about the extent to which intellectual property concerns will actually be implicated by the provision of network elements, Part III addresses and refutes the ILECs' claims that such rights will frequently be implicated. Indeed, the recent proliferation of groundless intellectual

property claims as a means of denying access and interconnection rights to CLECs provides a particularly compelling rationale for the Commission to address those incentives by reaffirming here the ILECs' responsibility to obtain any necessary license amendments themselves.

I. The Commission Has Jurisdiction To Issue A Declaratory Ruling.

Four ILECs raise a threshold objection to the Commission's authority even to address this issue. They claim that because interpreting and clarifying the Commission's rules on nondiscriminatory access could result in the subsequent invalidation of provisions that ILECs have included in arbitrated interconnection agreements and SGATs, and because arbitrated interconnection agreements are subject to review by federal courts and SGATs by State commissions rather than by this Commission, this Commission has no authority to issue interpretations of its rules.[11] This objection is frivolous.

The Commission has the statutory authority to adopt rules implementing Section 251(c)(3)'s requirement of nondiscriminatory access to network elements, and to interpret the rules and principles it already has adopted. See 47 U.S.C. §§ 154(i), 201(b), 251(d)(1), 303(r). Indeed, the claims in this proceeding are all based on the 1996 Act, and the rules and principles the Commission adopted in the First Report and Order and the Infrastructure Sharing Order to implement that Act. The Act's provisions establish that the Commission's rules will affect

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[11] See Bell Atlantic/NYNEX, pp. 1-2; BellSouth, pp. 2-3; GTE, pp. 2-3.

interconnection agreements and SGATs, but far from depriving the Commission of jurisdiction, those provisions expressly confirm that jurisdiction. Once the Commission adopts or interprets its rules, State commissions and federal courts are then bound to ensure that agreements and SGATs comply with those rules. See 47 U.S.C § 252(c)(1) (arbitrated agreements must "meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title"); 47 U.S.C. § 252(f)(1-2) (SGAT must "comply with the requirements of section 251 of this title and the regulations thereunder").[12]

II. As The Commission Concluded In The Infrastructure Sharing Order, The Only Rule That Ensures That ILECs Will Satisfy Their Statutory Access Obligations In A Prompt, Efficient, And Nondiscriminatory Manner Is One That Requires The ILECs To Negotiate Any Necessary License Modifications Themselves.

As AT&T pointed out in its Comments, incumbent LECs have every incentive to "construe" their existing contractual arrangements to preclude them from satisfying their statutory obligation to provide CLECs with nondiscriminatory access to network elements even when those licensing agreements create no such obstacles. The only rule that can effectively enable CLECs to obtain nondiscriminatory access is one that removes those incentives by providing that, if any license amendments are in fact necessary, it is the obligation of the ILEC to secure them, and then to spread the appropriate costs of the element among all carriers, including itself. Only that rule ensures that a CLEC's

[12] In addition, MCI has also requested (p. 10) a ruling under Section 253, and no ILEC even suggests that the Commission lacks authority to issue a ruling under Section 253.

right to obtain access to unbundled elements will not be delayed or thwarted, and places the obligation to act on the parties best situated to do so by virtue of their superior access to information and bargaining positions.

The comments filed in this proceeding starkly confirm both the nature of the ILECs' incentives and the pressing need for the Commission to reaffirm these principles. These are most directly illustrated by laying SBC/PacTel's Comments side by side with those of its two principal vendors, Lucent and Nortel. While SBC/PacTel and its affiant, Mr. Milgrim, contend that the standard provisions in SBC's licenses reflect its vendors' intention to prevent SBC from providing access to CLECs, the vendors say otherwise. As is discussed below, see infra Part III, Lucent's and Nortel's comments confirm that in the ordinary course "no additional license agreements or fees should be required for a competing local exchange carrier's resale of incumbents' services or access to unbundled network elements."[13] Thus, in a remarkable inversion of the traditional relationship between licensee and licensor, SBC/PacTel is asserting a broader view of its licensors reserved rights than the vendors themselves -- a fact which alone indicates that some highly distorted incentives are at work.[14]

It was to address those anticompetitive incentives, and to enforce the ILECs' statutory obligations in the face of those

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[13] See Lucent, p. 2; see also Nortel, p. 7.

[14] Cf. Nortel, p. 3 ("Nortel recognizes the theoretical potential for an ILEC to attempt to rely on the existence of intellectual property, confidentiality, and contractual rights to preclude or delay entry by competitors").

incentives, that the Commission in the Infrastructure Sharing Order expressly rejected under Section 259 the precise claim that SBC/PacTel raises here under Section 251. Section 259 requires ILECs "to make available to any qualifying carrier such public switched network infrastructure, technology, information, and telecommunications facilities and functions as may be requested by such qualifying carrier for the purpose of enabling such qualifying carrier to provide telecommunications services." 47 U.S.C. § 259(a). SBC argued in that proceeding, as here, that "because incumbent LECs' networks are built upon licenses to use intellectual property, 'the sharing of any intellectual property must be conditioned upon the qualifying carrier obtaining a sufficient license from parties that have a [protectable] interest in such property.'"[15] It further made the irrelevant assertion, as here, that the Commission lacked authority to "override any party's intellectual property rights." Id.

A number of parties, including the Rural Telephon Coalition and AT&T, objected to SWBT's position. AT&T noted tha "[ILECs] that have obtained the right to use software generics frc their switching vendors are entitled to use those facilities t serve not only their own traffic, but also to serve qualifyi carriers that share the [ILEC's] infrastructure,"[16] and that it w therefore quite unlikely that ILECs would in fact need to p "additional costs or fees" to their vendors for such uses. At a

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[15] See Infrastructure Sharing Order, ¶ 63.

[16] See id., ¶ 65.

rate, AT&T pointed out that "'if qualifying carriers were required to negotiate licensing agreements with all of an [ILEC's] equipment vendors, none of which have any incentive to negotiate reasonable terms . . ., it is reasonable to assume that the carrier's ability actually to use the [ILEC's] infrastructure to serve its customers will be seriously impeded."[17]

The Commission squarely rejected SBC's claims. After observing that "in the ordinary course of providing [infrastructure sharing] to qualifying carriers," new or modified intellectual property "licensing will not be necessary,"[18] the Commission reaffirmed its prior tentative conclusion: "whenever it is 'the only means to gain access to facilities or functions subject to sharing requirements,' section 259 requires the providing LEC to seek, to obtain, and to provide necessary licensing, subject to reimbursement."[19]

As the Commission explained:

> [W]e agree with AT&T and RTC that providing incumben LECs may not evade their section 259 obligations merel because their arrangements with third party providers c information and other types of intellectual property c not contemplate -- or allow -- provision of certain typ of information to qualifying carriers. Therefore, decide that the providing incumbent LEC must determine appropriate way to negotiate and implement section 2 agreements with qualifying carriers, i.e., withc imposing inappropriate burdens on qualifying carrier In cases where the only means available is including t qualifying carrier in a licensing arrangement, providing incumbent LEC will be required to secure s licensing by negotiating with the relevant third pa

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[17] See id.

[18] See id., ¶ 69.

[19] See id.

> directly. We emphasize that our decision is not directed at third party providers of information but at providing incumbent LECs. We merely require the providing incumbent LEC to do what is necessary to ensure that the qualifying carrier effectively receives the benefits to which it is entitled under section 259.[20]

There is no reason to construe the ILECs' obligations under Section 251 any differently.[21] To the contrary, section 251's express requirement that access be "nondiscriminatory," and the greater likelihood that ILECs will engage in gamesmanship in dealing with direct competitors under section 251 than in dealing with qualifying carriers under section 259, would, if anything, support imposing greater obligations on an ILEC when acting under section 251.

None of the claims raised by the ILECs in this proceeding provides any basis for the Commission to depart from its prior correct resolution of these issues in the Infrastructure Sharing Order. Indeed, neither SBC/PacTel nor any of the other commenting ILECs suggest any legal basis at all for their position. None attempts to explain how it could be consistent with the nondiscrimination requirement of section 251(c)(3) for an ILEC to use the elements of its network in ways that CLECs seeking to obtain access cannot. Nor does anyone defend the notion that a ILEC may somehow nullify its federal law obligations to CLEC simply by entering into secret contracts with third parties tha

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[20] See Infrastructure Sharing Order, ¶ 70 (emphasis added).

[21] Indeed, the Commission concluded in the Infrastructure Shari Order that qualifying carriers under section 259 could lea network elements "alternatively pursuant to section 251 or pursua to section 259." Id., ¶ 54.

(are alleged to) require that the ILEC engage in discriminatory behavior.

That point deserves special emphasis. As is explained in the attached affidavit of Mr. Richard Bernacchi, a nationally renowned expert in technology and software licensing, there is nothing inherent in intellectual property law that imposes any limitation on the ILECs' ability to comply with their obligations under section 251(c)(3). Any such limitation would exist, if at all, only by virtue of restrictive contractual provisions. See Bernacchi Aff., ¶ 7. If the ILECs were to prevail on their claim that such contractual arrangements provide a legitimate basis for evading these statutory obligations, they would then be free to -- and undoubtedly would -- revise such arrangements to include, and incorporate in all future licenses, provisions that would explicitly prohibit them from providing network elements to other carriers.

Instead of responding to the CLECs' actual claim, the ILECs devote most of their comments to refuting a strawman. They repeatedly argue that it would be neither lawful nor sound policy for the Commission to seek to "alter intellectual property rights of third parties,"[22] "grant a compulsory license in derogation" of existing contracts,[23] or "expropriate intellectual property without just compensation."[24] No party has sought such a result. Nor has

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[22] See Ameritech, pp. 3-5.

[23] See SBC/PacTel, p. 16.

[24] See id.

any party ever claimed that such a result is required by the Commission's rules -- except the RBOCs and GTE, when they irresponsibly caricatured those rules to the Eighth Circuit in an effort to have them set aside.[25]

Instead, the only question is which set of carriers -- ILECs or CLECs -- must negotiate with the vendors for any additional licenses that may actually be necessary. The resolution of that question cannot threaten any intellectual property rights. Just as the Infrastructure Sharing Order was "not directed at third party providers of information but at providing incumbent LECs," so too the ruling here would simply "require the providing incumbent LEC to do what is necessary to ensure that the qualifying carrier effectively receives the benefits to which it is entitled under section [251]" and thus "to seek, to obtain, and to provide [the] necessary licensing."[26] That would satisfy all the legitimate needs and rights of the vendors by "preserv[ing] [their] rights to require additional licenses as may be necessary."[27]

Once the ILECs' rhetorical attack on positions no party advocates is set aside, the ILECs advance only two substantive arguments in opposition to the CLECs' position. First, GTE claims (p. 7) that the declaratory order MCI and others seek would be inconsistent with the Commission's treatment of proprietary network

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[25] See AT&T, p. 6 (citing Brief for Petitioners Regional Bell Companies and GTE, Iowa Utilities Bd. v. FCC, No. 96-3321 (8th Cir.) (filed Nov. 18, 1996)).

[26] See Infrastructure Sharing Order, ¶¶ 69-70.

[27] See Lucent, p. 6.

information in its Second Report and Order.[28] Second, some ILECs, in particular SBC/PacTel, assert that it is both unnecessary and impractical to require ILECs to secure any necessary license modifications. Both sets of claims are baseless.

First, GTE's selective discussion of the Commission's Second Report and Order distorts the Commission's reasoning and thus obscures the fundamental distinction between the situation here and the issues that order resolved. In particular, the Second Report and Order "recognize[d]" that "the potential exists for some incumbent LECs to use [intellectual property] concerns as either a shield against entry of competitors into their markets, or as a sword to hamper the competitor's business operations."[29] Accordingly, although the Commission there permitted ILECs to refer CLECs to negotiate with third parties for the release of any necessary proprietary information associated with an ILEC's compliance with its network disclosure obligations under section 251(c)(5), the Commission specifically held (¶ 258) that "upon receipt by the [ILEC] of a competing service provider's request for disclosure of confidential or proprietary information, the applicable public notice period will be tolled" while those negotiations take place. Under this regime, therefore, the ILEC is itself prohibited from implementing its desired network change until completion by the CLECs of any necessary negotiations, and it

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[28] See Second Report and Order and Memorandum Opinion and Order, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98 (rel. Aug. 8, 1996) ("Second Report and Order").

[29] Second Report and Order, ¶ 259.

was only "[g]iven these incentives" (¶ 259) that the Commission permitted -- but did not require -- the ILECs to refer CLECs directly to third parties. Moreover, even with that restriction the Commission "emphasized that incumbent LECs are required to provide adequate access to even proprietary information if a competing service provider needs that information to . . . maintain interconnection and interoperation" -- a duty that could obviously include securing license amendments itself where necessary.[30]

Second, the ILECs' claims that it would create no burden for CLECs to negotiate the license modifications, but that it would nonetheless be impractical for them to secure any license modifications themselves, are meritless. To begin with, both large and small CLECs unanimously share the view that negotiating such licenses would present them with an enormous and potentially insuperable burden.[31] SBC/PacTel and the other ILECs can claim that such a requirement "would impose no more of a burden upon the CLECs than is typically imposed upon any other entity seeking to use the intellectual property of another"[32] only by ignoring the pertinent facts. In particular, they refuse to confront that: (1) while the ILECs were free to choose among vendors at the time they procured their equipment, CLECs would be required, under the ILECs' proposal, to secure permission from those specific vendors whom the ILEC had previously chosen -- and would therefore be almost

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[30] See id., ¶ 259.

[31] See Comptel, p. 5; LCI, pp.5-6; Sprint, p. 6; TRA, pp. 6-8.

[32] See SBC/PacTel, p. 18; see also BA/NYNEX, p. 4, Bellsouth, p. 6; GTE p. 9.

certainly required to pay inflated fees that are far higher than those paid by the incumbent, see Bernacchi Aff., ¶ 14; (2) many of the vendors in question have no prior relationship with the CLECs, while the ILECs may be their best and biggest customers; (3) without access to the relevant contracts it will be impossible for CLECs to make determinations as to whether any licenses may be necessary, and likewise impossible to use those contracts as bargaining tools to receive equivalent terms and conditions; and (4) whereas incumbent carriers entered into their arrangements over a period of many years, CLECs could be faced with the alleged necessity of negotiating scores of licensing agreements -- as many as 82, under SBC's own view -- at once in order to implement their entry strategies. SBC's proposal would thus not only "virtually guarantee[]" that CLECs would face "'discriminatory'" prices and other burdens, see Bernacchi Aff., ¶ 14, but would also create a substantial impediment to entry -- which is why the Commission should declare not only that these ILEC practices violate section 251, but also that any state order approving or requiring such practices is preempted under section 253.[33]

The likelihood that CLECs would experience such difficulties is further confirmed by the Comments filed by the "Ad Hoc Coalition of Telecommunications Manufacturing Companies." Here, contrary to Lucent and Nortel, they argue (pp. 3-6) that CLECs, not ILECs, must negotiate with them for any additional licenses. But why do they care? It would logically matter to them

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[33] See AT&T, pp. 17 - 18.

which set of carriers seeks the license amendments only if (1) they believed they could extract a higher price from CLECs than ILECs, (2) they wished to please their ILEC customers by taking this position, or (3) both.

SBC/Pactel's claims that it would be unworkable to require ILECs to secure any necessary license modifications are similarly contrived. SBC/PacTel claims (a) that ILECs would not have sufficient knowledge of the CLEC's business plans to effectively secure the licenses necessary for that CLEC's access,[34] and (b) that vendors would be unable to protect the confidentiality of their proprietary information in the absence of a direct contractual relationship with the CLEC.[35] With respect to the first contention, an ILEC would generally be required to secure for CLECs no more than the same rights that the ILEC itself enjoys. If a given licensing arrangement permits an ILEC to perform a certain function, the ILEC should secure the same rights for the CLECs. Satisfaction of that obligation would not require the ILEC to know anything about the CLEC's business plans.[36]

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[34] See SBC/PacTel pp. 21, 23-24.

[35] See id., p. 26.

[36] A different situation might arise if a CLEC requests to use the ILEC's network in a way the ILEC itself does not, such as where the CLEC seeks to activate vertical features of the switch which the ILEC has left dormant and not purchased. Although it is possible that in such a situation an ILEC might need access to some information from the CLEC, CLECs are always free, as AT&T explained in its Comments (pp. 11-12 n.17), to choose to approach third party vendors directly. Thus, in those narrow circumstances in which there is a need to provide information to the ILEC and fulfilling that need would in fact present "insurmountable difficulties," see SBC/PacTel, p. 21, the CLEC will presumably protect its (continued...)

The claim that manufacturers must contract directly with CLECs in order to protect their interests in confidentiality is equally specious. Foremost, the claim is decisively refuted by the Comments of Lucent and Nortel, neither of which oppose the requirement that ILECs negotiate any necessary license modifications. Indeed, Nortel specifically expresses its willingness to conduct such negotiations with ILECs. See Nortel, pp. 2, 7-8. Moreover, such arrangements are thoroughly routine. As Mr. Bernacchi explains (¶ 13), "[l]icense agreements often permit sublicensing or access to third parties under circumstances where the third party must agree to abide by certain agreements or provisions of the license agreement," and CLECs would certainly agree to sign and abide by any reasonable and nondiscriminatory confidentiality agreement.

III. The Comments Confirm That The ILECs' Intellectual Property Claims Are, At A Minimum, Substantially Inflated.

As AT&T stated in its Comments (p. 18), "there is no need for the Commission or any CLEC to assess with certainty the ultimate validity or scope of the incumbent LECs' purported intellectual property concerns in order to determine what the incumbent LECs' obligations are in any situation in which such claims might validly arise." Nevertheless, the Comments filed by other parties amply confirm the accuracy of AT&T's suspicion that the ILECs' intellectual property claims are, at a minimum, substantially overblown.

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[36] (...continued)
competitively sensitive information by at least attempting to negotiate with the vendor itself.

Indeed, in the Infrastructure Sharing Order the Commission reached precisely this conclusion:

> In the ordinary course of providing "public switched network infrastructure, technology, information, and telecommunications facilities and functions" to qualifying carriers, we fully anticipate that such licensing will not be necessary. We believe that, as suggested by AT&T and Sprint, infrastructure sharing can be accomplished through the use of agreements whereby providing incumbent LECs who own or lease certain types of information or other intellectual property provide functionalities and services to qualifying carriers without the need to transfer information that is legitimately protectable.

Infrastructure Sharing Order, ¶ 69 (footnotes omitted).

The Commission's conclusion with respect to infrastructure sharing under section 259 fully applies to the provision of network elements under section 251 -- as the ILECs' largest vendors agree. "Lucent believes that it should not be necessary for CLECs to obtain separate licenses simply to resell incumbents' services or obtain access to unbundled elements pursuant to Section 251 of the Act, the FCC's Order in Docket No. 96-98, or an analogous state or local regulatory commission order,"[37] and "Nortel's concerns typically will not arise if the request for unbundled elements can be accommodated by Nortel's customer in a manner that does not require that the requesting party be given direct access to Nortel's software or proprietary information."[38]

In an effort nevertheless to establish the existence o possible licensing restrictions that would prohibit an ILEC fro

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[37] See Lucent, pp. 5-6.

[38] See Nortel, p. 7.

providing access to network elements, SBC/PacTel offers the affidavit of Roger Milgrim. However, perhaps the most significant aspects of Mr. Milgrim's affidavit are how much he does not say -- and the extent to which even his highly limited conclusions are based on incorrect facts supplied him by SBC/PacTel.

To begin with, Mr. Milgrim's entire affidavit is based on a false assumption. Mr. Milgrim states that it is his "understanding that the licensed software is in use in the operation, and can be accessed by the operator, of the SBC network facilities that [CLECs] petition[] to use." Milgrim Aff., ¶ 17 (emphasis added). That understanding is inaccurate. As AT&T explained in its Comments (p. 7), the Commission's regulations do not provide CLECs a right directly or physically to access computer terminals or software.

Moreover, even on the basis of that erroneous assumption, Mr. Milgrim makes only two specific claims in support of SBC/PacTel's intellectual property arguments. First, Mr. Milgrim asserts (¶ 19) that in many instances "the license grant restricts use of the software licensed to SBC and its affiliates for its and their internal use (i.e. to operate its own business)," and then opines that violation of that restriction is "the very thing implicated by [a CLEC's] request." That assertion is wrong, for providing CLECs with network elements is now part of an ILEC's business. As Mr. Bernacchi attests (¶ 10) on the basis of years of experience negotiating software licenses, "since access by [CLECs] is being mandated by law and is technically very analogous to the access provided to others in the past, it seems unlikely that the

mandated access by [CLECs] would be determined to be outside the scope of the ILECs' business for purposes of the license grants."

Indeed, Mr. Milgrim's interpretation of the licensing agreements he reviewed is sharply contradicted by the views of Lucent, the party to many of the contracts at issue and whose "inten[tions]" (Milgrim Aff., ¶ 19) Mr. Milgrim claims to construe:

> Lucent believes that, while the personal non-transferable aspects of the license preclude the transfer or replication of said software without Lucent's consent, an incumbent's provision of resold services or access to unbundled network elements in accordance with Section 251 of the Act generally constitutes such incumbent's "own" or "internal" business purposes and, as such, would not automatically require an additional license agreement or fee.[39]

It is quite unlikely, therefore, that any licenses that expressly or impliedly limit an ILEC to the use of the software for its own business purposes would prohibit an ILEC from fulfilling its statutory duties of providing access to other carriers for the provision of telecommunications services.

Second, Mr. Milgrim states that "[i]f, to render its services to its customers on SBC's network facilities, MCI were to access licensed object code, confidential source code or documentation for the software, that access alone would violate the licensor's intellectual property rights."[40] The complete answer to this claim is that CLECs will not need to have direct access to the source code, object code or documentation for the software. I

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[39] See Lucent, p. 3.

[40] See Milgrim Aff., ¶ 21 (emphasis added).

these circumstances, no licenses would be violated. See Bernacchi Aff., ¶ 8.[41]

Thus, none of the Comments undermine in any way the Commission's conclusion in the Infrastructure Sharing Order that in the ordinary course access to network facilities will not require any new licenses or any amendments to existing licenses. The record thus confirms that these claims are driven not by genuine concern for the intellectual property rights of third party vendors, but rather by attempts to thwart competitive UNE-based entry.

Respectfully submitted,

/s/ DAVID W. CARPENTER

David W. Carpenter
Peter D. Keisler
Daniel Meron
SIDLEY & AUSTIN
One First National Plaza
Chicago, IL 60603
(312) 853-7237

Mark C. Rosenblum
Roy E. Hoffinger
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-3539

Counsel for AT&T Corp.

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[41] SBC/PacTel, but not its affiant, states (p. 11) that the "use by a CLEC of unbundled network elements in conjunction with its own equipment, software or systems . . . may violate intellectual property rights." Although AT&T has not been given access by SBC to its licensing agreements, in AT&T's experience the agreements between telecommunications carriers and their vendors permit the carrier to use the equipment or software broadly to provide telecommunications services, and such provisions would not be violated when a licensee combines the equipment in new ways to provide new telecommunications services. Thus, as long as the ILEC obtains the same rights for CLECs as it has obtained for itself, no violation of intellectual property rights will occur.

ATTACHMENT A